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ABSTRACT

Two apparently widely held beliefs among college administrators may be harmful to higher education. The first is that faculty collective bargaining is somehow unprofessional and automatically harmful to educational purposes. The second is that bargaining erodes the authority of administrators and trustees, thereby preventing them from accomplishing their work with some degree of efficiency and leadership. Bargaining encourages strong executive leadership and the standardization of institutional procedures. Bargaining does not, per se, reduce the employer's right to make unilateral decisions about subjects not directly impacting conditions of faculty employment. On the other hand, faculty members have rights that should be vigorously upheld, with or without bargaining. (Author/MSE)

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SPECIAL REPORT #29

MANAGEMENT PREROGATIVES AND FACULTY RIGHTS[1]

By

George W. Angell

This piece by George W. Angell is a departure from ACBIS usual announcements of events and research studies in that it reports an individual position paper. Angell is concerned that extreme positions by either party at the bargaining table can be detrimental to higher education. As an antidote to extremism he attempts to fashion a middle ground which he calls "a reasonable institutional posture for bargaining with a faculty union." As he points out, the paper is intended to stimulate debate and not to provide final answers.

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Edward P. Kelley, Jr.
Associate Director

[1]This paper received much of its inspiration from an article written by Paul Prasow entitled "The Theory of Management Reserved Rights - Revisited", proceedings of the 26th Annual Winter Meeting December 28, 1973, New York. Editor: Gerald G. Somers, 1974 IRRA, Madison, Wisconsin.

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In visits with college and university administrators throughout the nation I have been deeply impressed by two widely held opinions which I believe to be harmful to higher education. The first is that faculty collective bargaining is somehow unprofessional and automatically harmful to educational purposes. The second is that bargaining erodes the authority of administrators and trustees thereby preventing them from accomplishing their work with some degree of efficiency and "leadership."

I also note that union leaders at many of these campuses have less than full appreciation of the difficulties under which administrators work. In addition, they feel that administrators have too much authority and that one purpose of bargaining is to permit the union to assume some of that authority wherever possible.

I have come slowly to the conclusion that these opinions held by administrators and union leaders are based on false premises and are harmful to higher education because they prevent the development of mutual trust and cooperation.

The purpose of this paper, then, is to express some ideas and opinions that hopefully will bring these concerns into open debate. Specifically I shall discuss (a) management prerogatives (b) faculty members' rights, (c) how faculty rights modify some management prerogatives, (d) how faculty and management rights are modified by state and Federal law and (e) a reasonable institutional posture for bargaining with a faculty union.

Management Prerogatives

It is the "employer" who establishes the institution, obtains a charter, provides funds, determines mission and programs, employs staff, organizes resources, assigns work to staff, determines size of the student body, builds the physical plant, levies tuition and fees, and carries on a host of other managerial duties. For purposes of discussion I shall call these types of activities, "decisional rights", meaning that unless the employer has the "right to decide" to do these things, regardless of economic, social and legal restrictions, the instutiion will never be born, or once born will quickly go out of existence. Thus, management is under the constant imperative to "make things work", to "get things done", and to see that the mission is accomplished. Education laws, labor laws and labor boards recognize and support these imperatives. Not even faculties and unions deny that

someone must be the "boss" who gives orders and enforces those orders so that the college can get its business done. They also know that management must plan ahead, make necessary changes in programs and resources, and in general, assure the success and future existence of the college. This is of course a tremendous responsibility that cannot be assumed without broad powers and authority. The American custom of placing "decisive" authority in the hands of a chief executive establishes two expectations: that a continuous flow of executive decisions will occur, and that should these decisions result in less progress than desired the executive who is nontenurable, precisely because of this decisive authority and responsibility, may be peremptorily removed from office.[2]

Rights of Faculty Members

Labor laws and labor boards when speaking of employee rights justifiably couch them in collective bargaining terminology such as "unfair labor practices", "mandatory subjects of bargaining", "bargain in good faith", etc. But from my analysis of court rulings, most employee rights (not to be confused with the right of the faculty as a whole to bargain collectively) are simply an extension of a citizen's constitutional rights. In particular, they are restatements of the right to (a) freedom of expression (b) freedom from coercion (c) equality of opportunity and treatment, and (d) due process. Almost every college president in America vigorously upholds these constitutional rights of citizens. In fact these rights constitute the basis of academic freedom and the mission of research, teaching and learning. Why then, do college administrators find it so difficult to accept these rights when expressed in terms of faculty unionization and collective bargaining? The question has no reliable answer because it varies among individuals and campuses, but my guess is that it lies in their concepts of justice. In a sense they feel that (1) they are being coerced by labor laws and union organizers to use a legalistic process of contractual bargaining to perform those academic rituals which in their minds are better accomplished through collegial governance, and (2) that bargaining deprives them of authority essential to perform their jobs efficiently and effectively. These can be deep and debilitating concerns unless an executive, forced by the faculty to bargain, sees the justice inherent in the negotiations process, and understands that bargaining is a viable, neutral process that can protect the rights and authority of administrators as well as those of faculty.

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[2]Unfortunately in some state colleges and universities, the employer (governor) fails to delegate "decisive" powers to campus executives, often leading to serious labor problems for which the executives should not be, but are, held responsible. This is the subject of a later paper.

Impact of Faculty Rights on Management Rights

With full realization of the folly inherent in simplistic theories, I shall attempt to reduce the subject to simple terms in order to make discussion more pointed and less technical. In short, I believe that faculty rights expressed through unionization should have almost no new impact on the authority of most university executives to make decisions. In the first place American campuses have long recognized and respected the individual's right to bargain his conditions of employment. In addition academic freedom has steadily gained recognition and protection. What academics have been particularly slow in recognizing is the constitutional requirements of equal treatment and due process. The major reason for this, in my judgment, is the reluctance of the individual faculty member to seek relief through an expensive court proceeding that may produce negative publicity and jeopardize his professional future. This reluctance and the resulting lack of threat to the administration, however, does not relieve an institution from securing these rights for each of its employees. And most campuses, recognizing this responsibility, are making substantial progress, albeit slow, toward these goals. It is precisely this slowness that makes unionization attractive to faculty members. Unionization, in essence, permits faculty members to unite effectively for the purpose of speeding up the process of transforming "paper rights" into operational realities. In other words unions are formed not only to obtain better salaries but to see to it that institutions provide fair equal treatment and due process. In a sense unions perform a watchdog-catalytic function that includes a continuing scrutiny and improvement of working conditions, the facilitation of grievance processing, and the publicizing (and sometimes politicizing) of unresolved issues. A watchdog-catalytic function is not a management function. It does not reduce institutional authority to make decisions. If effective, however, unions will reduce the number of unchallenged arbitrary, capricious or discriminatory decisions made by administrators. Nevertheless, the employer must retain full authority to make decisions and the union must have (as faculty members always have had) the right to effectively challenge those decisions.

Equal treatment in regard to merit pay, promotions, tenure, reappointment, retrenchment, and similar subjects can never be assured to everyone on campus any more than a court can assure perfect justice to every party coming before it. What can be assured is a generally acceptable approach to securing equal treatment. Such an approach appears to have at least four dimensions: (1) established (published) performance criteria upon which all faculty will be evaluated, (2) consistent application of established (published) procedures for collecting and interpreting valid evidence relative to those criteria, (3) established (published) opportunity for the individual being evaluated

to challenge evidence and to provide additional evidence, and (4) established (published) grievance procedures that meet the condition of impartiality. Note the repetition of two words, "established" and "published." Some campuses have established criteria and procedures but have failed to effectively publish them, thus denying equal treatment to those who are ignorant of the procedures and the opportunities available within those procedures. Some campuses have unilaterally established and published procedures that permit administrators to arrive at defective decisions because sufficient safeguards were not built into those procedures. Collective bargaining is designed to correct these two possible deficiencies. The printed contract in the hands of every faculty member meets the requirement of "publication." Procedures leading to personnel decisions become mandatory subjects of bargaining. In this way bargaining requires the employer and employees to agree upon those procedures which have the best expectation of protecting the rights peculiar to each party, i.e., the right of the employer to manage, and the right of the employee to fair and equal treatment. In essence, this is the meaning of bargaining: that when two parties each have undeniable rights vested in the manner by which a decision is to be made, that procedure becomes a mandatory subject of joint negotiation. In fact, procedural issues, broadly defined, are probably the most significant subjects of faculty bargaining other than wages, hours and fringe benefits. Moreover, the procedures used in determining wage differentials and hours often appear during the negotiations to be almost as important to faculty as the substantive amounts. Since departmental faculties usually determine within broad limits their own hours and workloads with almost no administrative supervision and since college and university executives have traditionally, with or without collective bargaining, worked vigorously for higher faculty wages and benefits, it may be said that the only serious internal[3] impact of unionization on college administration is the necessity of negotiating and following a jointly determined set of consultation procedures (and sometimes the criteria, when so prescribed by law.)

The point of all this is simply that other than wages and benefits, faculty unions primarily negotiate procedures; they do not negotiate the right to substitute their decisions for those of management. I am not saying that unions from time to time (e.g., in the celebrated cases[4] at Rutgers University and St. John's University) will not attempt to negotiate the right to make, approve, or veto management decisions. Of course they try; but they usually fail unless management negotiators don't know the rules of the game, or are in an extremely weak position.

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[3]Bargaining may bring a number of serious external changes in relationships with trustees, government agencies, arbitrators, labor boards, etc.

[4]2 NJPER 13 (1976) and NLRB Case No. 29-CB-1858 (1975)

It is very important for several reasons that unions be denied the right to negotiate the authority to substitute their decisions for those of management. The first reason, as mentioned, is that no one could be held "decisively" responsible (discharged) for the quality of those decisions for which more than one person is responsible. (It is not easy to "fire" a union.) Secondly, once a union accepts authority to make management decisions it automatically disqualifies itself as an "employee" representative as defined in most labor laws. Thirdly joint decisions take an inordinate amount of time to make and the resulting cost of fiddling around may be that Rome burns. And fourthly, if unions perform management decisions faculty members will necessarily be required to lodge their grievances against the union. The resulting circus could look like a dog chasing its tail.

These four reasons should cause college and university administrators to take another look at their duties in relationship to collective bargaining. Under labor law, the duty to manage decisively is encouraged, not discouraged. As Arthur Goldberg stated many years ago when he was legal counsel for the Steelworkers Union:

> *Management determines the product, the machine to be used, the manufacturing method, the price, the plant organization, and innumerable other questions. These are reserved rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining... Mature, cooperative bargaining relationships require reliance on acceptance of the rights of each party by the other.*[5] *(Emphasis added.)*

In other words employees, and especially college faculty members, are fully capable of appreciating the importance of an energetic executive who knows what (s)he is doing and who makes efficient and realistic decisions without violating the procedures established jointly. Faculty members, I believe, want to work under bright, capable and decisive leaders. As Prasow said:

> *In its simplest form, the reserved rights doctrine may be expressed in five words: management acts, the union reacts... Management establishes the status quo..., a set of conditions, with or without the union's consent. The union, as the moving party, attempts to alter these conditions. In establishing a status quo, it makes no difference whether the employer is an individual, a corporation, a government, a university, or a union.*[6]

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[5] Arthur J. Goldberg. "Managements Rights Reserved: A Labor View", in Proceedings of the Ninth Annual Meeting, National Academy or Arbitrators, ed. Jean T. McKelvey, (Washington, D. C.: Bureau of National Affairs, Inc., 1956), p. 123.

[6] Op.Cit. p.74

It should be clear from the discussion thus far that bargaining requires strong intelligent executives who are not afraid to act. If the union does not like an action it can grieve but cannot legally strike. By signing the negotiated contract it effectively gave up its right to strike during the term of the contract. Again to quote Prasow:

> *The term "bargain", ...implies an exchange of consideration of value. The principle affirmed by the Supreme Court in Lincoln Mills and reaffirmed in the Steelworkers Trilogy of 1960 enunciates the fundamental bargain struck by the parties, namely, the union signs away its right to strike ...for a fixed period of time in exchange for a contract guaranteeing acceptable minimum rates of pay and working conditions and grievance/arbitration machinery.*[7]

While the union awaits a resolution of a grievance it is duty bound to require its members to continue work. That's one of the real advantages of a jointly negotiated grievance process. Both parties have faith that the negotiated procedure has as good a chance as any other method to produce a mutually acceptable resolution and each must refrain from attempting to use any other procedure for resolving a grievance. This is also consistent with the teachings of the university: to place our faith in scholarly, objective procedure rather than in force or in the judgment of a partisan.

Impact of State and Federal Law on Faculty and Management Rights

Under the National Labor Relations Act (NLRA) a faculty union has the right to strike and it is the union's major weapon to resolve impasses. On the other hand the college has a right to lockout, although this weapon is seldom used by private colleges. Each party gives up this special right during the term of a contract. The only other serious federal restrictions on the parties' respective rights primarily relate to the prohibition of coercion and are framed generally under the rubric of "unfair labor practices."

State laws however, generally establish more restrictions[8] on union and management bargaining activities than does NLRA. Of the twenty four states which have laws permitting public college faculties to unionize, only five (Alaska, Hawaii, Pennsylvania, Oregon and Montana) permit faculty strikes. But even where a strike is permitted there are restrictions (usually relating to public health and safety) on the conditions under which the strike is permitted. Twelve states further limit union rights by defining those management duties which are non-mandatory subjects of bargaining.

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[7]Op.Cit. p. 82

[8]See Special Report #17, Academic Collective Bargaining Information Service, Washington, D. C., 1976.

Delaware limits the union rights during an election period by prohibiting runoff elections. Iowa, New York and Vermont prohibit the negotiation of an agency or union shop, a union right permitted by all other twenty-one states. In fact, Connecticut, Hawaii, Massachusetts, Minnesota and Rhode Island limit the college's right to bargain union security by mandating either an agency shop or service fees to be paid by all unit members to the certified union.

Fourteen states limit the union's scope of bargaining by listing the mandatory and/or the nonmandatory subjects. Four state laws fail to protect union and management rights by not prohibiting coercive unfair labor practices. Nineteen states restrict the rights of both parties by reserving to the state legislature the final approval of all or some clauses in the agreement. Seventeen states restrict directly or indirectly the scope of bargaining by not giving the negotiated contract preemption over other state laws or bureaucratic regulations.

A number of state laws other than labor laws impact the rights of the parties in bargaining. Where the contract negotiated under labor law does not prevail over other law, state civil service regulations may be a major limitiation to the scope of bargaining for state employees although most states place faculty members outside the routine classified service regulations. Many states have special laws specifying for state employees a retirement program, grievance procedures, criteria and procedures for promotion, and other personnel transactions which limit the rights of the parties, especially those of the unions to negotiate their own terms with the public employer.

One type of restriction on bargaining rights may become more prevalent and perhaps devastating to the crucial subject of bargaining wages and fringe benefits: that of "prevailing rate systems" and similar policies. Especially since the financial problems of New York City became widely publicized, states have taken stringent measures to tighten the avenues of expenditures. New York City suffered the whipsawing effects of more than a hundred and fifty unions. Observing this, states and cities began to install protective mechanisms such as the limitation of wage rates to those of neighboring states or cities. In addition, states have begun to tie negotiated increases for all employees to those bargained by the largest single state bargaining unit. This is sometimes done unilaterally as in Massachusetts, recently.[9] Some states are moving toward coalition bargaining, requiring all state employee unions to bargain wage increases and fringe benefits simultaneously. In light of existing threats of inflation and recession the trend

[9]As reported in the January 10, 1977 issue of The Chronicle of Higher Education. The Governor refused to honor a contract negotiated by an NEA representative of faculties in the 15 Massachusetts community colleges, saying that he would give them the same raise negotiated for other state employees by the AFL-CIO unions.

toward more use of prevailing rates and coalition bargaining is almost certain to spread. This may be a serious threat to unions since union members, assured of prevailing salary and fringe benefits without the personal cost of union dues, may decide to withdraw from unions, or to decertify unions.

States also vary in the manner by which they restrict the right to negotiate the subject of arbitration. Five states (e.g. Kansas, South Dakota, Nebraska) require some form of arbitration by a governmental agency to resolve bargaining impasses. Five others have laws which permit the negotiation of impasse (interest) arbitration while four others require arbitration by neutrals. Grievance arbitration is required in seven states (e.g. Alaska, Florida, Minnesota), while it is a negotiable subject in nine other states. In the other eight states the law leaves the matter to labor board decisions.

It appears then, that states generally place far more restrictions on bargaining than does the Federal Government, and union activities bear the heavy burden of those restrictions. These restrictions leave no doubt that both federal and state governments want employers to manage and want their laws to limit bargaining strictly to conditions of employment, broadly interpreted.

A Reasonable Institutional Posture For Bargaining with a Faculty Union

It is impossible to describe an "effective" management posture because the respective strengths and objectives of institutions and unions vary so much from campus to campus. But I would like to assume that most colleges and universities, when bargaining, have certain common objectives including (1) to retain and strengthen the authority of the institution to manage its affairs efficiently and effectively: (2) to protect the legal rights of individuals, and (3) to maintain and improve working relationships with faculty members and their certified representative. To help institutions achieve these objectives, I would suggest four "general" guidelines for bargaining:

(1) Except for those subjects, (e.g. salaries, hours and fringe benefits) which are finalized at the bargaining table, all subjects, including governance and other working conditions should be bargained in terms of <u>procedures</u> by which the faculty makes its official voice heard;

(2) To protect faculty rights, the grievance procedure should meet all conditions of due process including binding arbitration by a jointly selected impartial individual or panel, excepting that neither a decision relative to a subject that is a management prerogative not limited by contractual procedures nor one in which management accepts the duly considered judgment of faculty, shall be subject to grievance since in the former a faculty member lacks "standing" and in the latter, the tests of reasonableness have generally been met:[10]

(3) The agreement should clearly reaffirm the duty and authority of administration (and trustees) to manage and direct the institution by specifying that each decision (after following negotiated procedures) shall be made by the institutional, not union, representatives; and

(4) To protect the administration's right to make a reasoned decision, all faculty recommendations mentioned in the agreement should be based on specified criteria and supported by convincing evidence gathered in accordance with specified procedures, and the evidence upon which a recommendation is based shall accompany each recommendation upon request.

These four guidelines, in my judgment, constitute a reasonable bargaining posture and when generally accepted by both parties can lead to a constructive relationship which encourages faculty members to do their teaching and research without undue fear of arbitrary intrusion by administration; and which encourages administration to manage and direct the institution without fear of capricious intervention by faculty. These guidelines, however, will never satisfy administrators whose first priority is to "beat the union"; nor will they satisfy union representatives whose motivation is to substitute, whenever possible, their judgment for that of administrators. Only "blood" can satisfy either group.

Summary

Bargaining encourages strong executive leadership and the standardization of institutional procedures. It protects management's right to initiate action, but requires joint determination of the procedures to be followed when management wishes to change a condition of employment. Bargaining does not per se reduce the employer's right to make unilateral decisions about subjects not directly impacting conditions of faculty employment. On the other

[10]No attempt is made in this paper to discuss reasonable limitations to the arbitration process, substance or remedies.

hand, faculty members have rights which should be vigorously upheld, with or without bargaining.

This piece should not end without a caveat. Courts, with or without the presence of negotiated contracts, are again and again telling administrators that their decisions must meet the test of reasonableness.[11] Arbitrary, capricious or discriminatory actions incur the possibility of reversal and the assessment of personal liability penalties by the courts. This has always been a possibility and rightly so. That is why I believe that bargaining does not create new restrictions on executive authority. Its principal effect on management is that a legal contract makes it easier for faculty to hold administrators responsible for acting in a lawful and reasonable manner. One of the principal effects on faculty members is that in the process of evaluating and recommending colleagues for tenure, reappointment, and promotion, they too must avoid arbitrary and capricious action. Similar results can and have been achieved at some nonunionized campuses through effective collegial governance.

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[11]For recent court decisions which hold educational officials personally liable for capricious exercise of authority see: The Supreme Court 1975 Wood vs.: Strickland decision; The Skehan vs. Bloomsburg State College decision by the U.S. Court of Appeals for the Third Circuit; and Endress vs. Brookdale Community College, New Jersey; "Courts Uphold Faculty Rights," NEA Advocate, December 1976, p.2.